94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 94-
2d Session } { 880 Part 2

Not to file

GOVERNMENT IN THE SUNSHINE ACT

APRIL 8, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. FLOWERS, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND SUPPLEMENTAL VIEWS

[To accompany H.R. 11656]

The Committee on the Judiciary, to whom was referred the bill (H.R. 11656) to provide that meetings of Government agencies shall be open to the public, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Page 2, lines 19, 20, 21, 22 and 23: Strike "the term 'meeting' means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations concern the joint conduct or disposition of agency business; and" and insert: "the term 'meeting' means an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but does not include meetings required or permitted by subsection (d); and".

Page 3, line 1: Strike "(b):" and insert:

"(b) (1) Members as described in subsection (a) (2) shall not jointly conduct or dispose of agency business without complying with subsections (b) through (g).

(2)".

Page 3, line 19: After "required" insert "or permitted".

Page 4, line 7: After "purposes", insert "or information which if written would be contained in such records,".

Page 4, line 8: After "records" insert "or information".

Page 5, line 11: Strike "where" and insert "after".

Page 5, line 12: Strike "already".

Page 5, line 13: Strike "or where" and insert "unless".

Page 5, line 15: Strike "proposal;" and insert "proposal, or after the agency publishes or serves a substantive rule pursuant to section 553 (d) of this title;".

Page 5, line 19: After "action" insert "or proceeding".

Page 6, lines 7, 8, and 9: Strike ", or with respect to any information which is proposed to be withheld under subsection (c)".

Page 7, line 9: Strike "of the portions".

Page 7, line 13: Strike "portions" and insert "meetings or portions thereof".

Page 9, lines 13, 14 and 15: Strike ", by recorded vote taken subsequent to the meeting and promptly made available to the public,".

Page 9, lines 17 through 20: Strike "In place of each portion deleted from such a transcript or transcription the agency shall supply a written explanation of the reason for the deletion and the portion of subsection (c) and any other statute said to permit the deletion."

Page 11, line 13: Strike "or its members".

Page 11, lines 21 and 22: Strike "wherein the plaintiff resides, or has his principal place of business" and insert "court of the United States for the district in which the agency meeting is held, or in the District Court for the District of Columbia".

Page 12, lines 13 and 14: Strike "Except to the extent provided in subsection (i) of this section, nothing" and insert "Nothing".

Page 12, lines 19 through 23: Strike "(i) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the judicial review proceedings, inquire into violations by the agency of the requirements of this section and afford any such relief as it deems appropriate.

Page 12, line 24: Strike "(j)" and insert "(i)".

Page 13, lines 2 and 3: Strike "(g), (h), or (i)" and insert "(g) or (h)".

Page 13, lines 4, 5, and 6: Strike "against an individual member of an agency only in the case where the court finds such agency member has intentionally and repeatedly violated this section and".

Page 13, line 11: Strike "(k)" and insert "(j)".

Page 13, line 20: Strike "(l)" and insert "(k)".

Page 14, line 5: Strike "(m)" and insert "(l)".

Page 14, line 9: Strike "(n)" and insert "(m)".

Page 14, line 14: Strike "(o)" and insert "(n)".

Page 18, line 8: After "required" insert "or permitted".

Purpose

The purpose of the proposed legislation is to amend the Administrative Procedure Act provisions of title 5, United States Code, to provide, subject to the exceptions in the bill, that all meetings of agencies headed by a collegial body of two or more members shall be open to public observation. The new section added to title 5 would provide for procedures and court jurisdiction to implement this purpose. In addition, the bill would add language to existing provisions of the Administrative Procedure Act to bar ex parte communications in connection with adjudication and formal rule making under the provisions of that Act now codified as a part of title 5.

EXPLANATION OF COMMITTEE AMENDMENTS

Page 2, lines 19 through 23
(Definition of "meeting")

This amendment would change the definition of "meeting" in § 552b (a) (2) to read: "the term 'meeting' means an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but does not include meetings required or permitted by subsection (d); and".

New section 552b requires advance notice of the date and place of meetings, their subject matter, and whether it will be open or closed to the public. The revised language of the definition of "meeting" makes it possible to identify the meeting and its purpose to satisfy this requirement of advance notice. It makes it clear that there must be at least two members at the meeting, with an additional requirement that there also be at least the number of individual agency members required to take action on behalf of the agency. It also adds the clarification that the term includes any joint communication such as a conference telephone call. This definition must be read in relation to the amendment made to subsection (b) which provides that the agency members referred to in this subparagraph cannot jointly conduct or dispose of agency business other than as provided in the section—that is, in an open meeting or, where authorized, a closed meeting governed by the same definition. This amendment includes the words "but does not include meetings required or permitted by subsection (d)". This would except from "meetings" covered by the new section those meetings required to decide matters covered by subsection (d) which are procedural in nature and concern decisions and voting on closing meetings and on announcing meetings. However, such meetings could not include the conduct or disposition of agency business.

Page 3, line 1

(Prohibition Against Evasion of Provisions of New Section 552b as to Conduct or Disposition of Agency Business)

The new language added as new subparagraph (b) (1) of section 552b would bar the conduct or disposition of agency business other than as provided in subsections (b) through (g) of new section 552b. This gives an express standard for compliance. On challenge, a court will be in a better position to determine whether the agency has complied. This provision will bar any effort of the number of members necessary for agency action to deliberate, discuss, conduct, or dispose of agency business other than in an open meeting as provided in new section 552b or in a closed portion authorized by the exceptions in that section.

Page 3, line 19

(Statutes requiring or permitting withholding of particular information)

The amendment adds the words "or permitted" to the existing language of exception (3) of subsection (c) providing an exception for

withholding of information directed by statute. Many statutes permit the withholding of information but since they allow judgment or discretion in withholding information, the bill would not have originally included such statutes within the exception. The amendment is consistent with the language and purpose of those statutes which assume that such information can be withheld when the information has been determined to fit the criteria or particular identification of the statute concerned.

Page 4, line 7

(Clarification as to Non-record Information)

The exceptions in the bill were patterned after the Freedom of Information Act (5 U.S.C. 552), an Act which concerns written records. This bill concerns the right of members of the public to observe agency meetings at which information will be given in oral discussions. This amendment clarified the fact that the exception also applies to information given orally by adding to "records" the phrase "or information which if written would be contained in such records".

Page 5, lines 11 and 12

(To Clarify When the Exception as to Premature Disclosure of Agency Will *Not* be Available)

The substitution of the word "after" for "where" is to clarify that the exception as to a frustration of agency action will be unavailable after the content or nature of the action has been disclosed. The word "already" is deleted as unnecessary.

Page 5, line 13

(Inserting the Word "Unless" to Qualify the Previous Bar to the Use of the Exception in Cases Where Disclosure is to be Made Prior to Final Agency Action)

The word "unless" is substituted for "or where" to make a further qualification concerning required statutory disclosure prior to final action.

Page 5, line 15

(Reference to Public Notice of Rule Making Under Section 553 of title 5)

The addition of the language relating to rule making makes it clear that the exception does not apply after notice of rule making has been given under section 553.

Page 5, line 19

(Legal "Proceedings")

The addition of the word "proceeding" is added so that it will be included along with a civil action.

Page 7, line 9, and line 13

(Clarification of Meetings Subject to Exception)

The words "of the portions" were deleted because of the difficulty of determining how "a majority of the portions" of agency meetings could be determined. While a "portion" could be all or a part of a meeting, the term is unclear for the purpose of determining a majority as provided in the subparagraph. This amendment will make such a determination possible.

Page 9, lines 13, 14 and 15 and Page 6, lines 7, 8 and 9

(Striking the Requirement for Agency Vote on Each Transcript Deletion)

The amendment on page 9 is to strike the words ", by recorded vote taken subsequent to the meeting and promptly made available to the public,". This would preserve the right of the public to access to a transcript or recording of any closed meeting with only those portions deleted that are subject to the exceptions in section 552b. However, it would relieve the agency members from the detailed and procedurally difficult operation of going over the transcripts or recordings and voting on deletions. The amendment on page 6, lines 7, 8 and 9 deletes the words ", or with respect to any information which is proposed to be withheld under subsection (c)", and this is a conforming amendment to the one described above.

Page 9, lines 17, 18, 19 and 20

(Striking the Requirement for a Written Explanation of Each Deletion)

The amendment deletes the requirement of a written explanation of each deletion from the transcript by striking the words "In place of each portion deleted from such a transcript or transcription the agency shall supply a written explanation of the reason for the deletion, and the portion of subsection (c) and any other statute said to permit the deletion." Of course, the complete transcript or recording must be made and kept as provided in the section to be available in the event of any court challenge as provided in subsection (h).

Page 11, line 13

(Deletion of "or its members")

The language of subsection (h) authorizes an action against the agency so that it would not be necessary to join individual members to gain court jurisdiction. The amendment also removes the objection that the provision would have the effect of subjecting individual agency members to suit for official acts and possibly being assessed costs and attorneys fees. The amendment also conforms to the amendment on page 13 deleting the references to members in reference to the assessment of costs.

Page 11, lines 20 and 22

(Changing Venue Requirements to Require Challenges Based on Section 552b to be Brought in the District in Which the Agency Meeting is Held or in the District of Columbia or in the District in Which the Agency Has its Headquarters)

This amendment substitutes the words "court of the United States for the district in which the agency meeting is held, or in the District Court for the District of Columbia" for the words "wherein the plaintiff resides, or has his principal place of business." It should be emphasized that the language of the section conferring jurisdiction in the district courts to enforce requirements of the section and permitting "any person" to bring the action are retained. These actions would concern meetings of the agency and matters relating to those meetings. It is therefore logical that the actions be brought in districts in which those meetings are or have been held. The amended venue provisions are, therefore, appropriate in view of the purpose of the new section and of court enforcement of its specific provisions concerning the conduct of the meetings.

Page 12, lines 13 and 14 and
lines 19 through 23; and
Page 13, lines 2 and 3

(Striking Subsection (i) referring to Review of Agency Actions)

While subsection (h) of section 552b provides that any court, acting under the jurisdiction provided therein to enforce the requirement of subsections (b) through (g) of the section cannot set aside, enjoin or invalidate any agency action by reason of the violation concerned, subsection (i) would permit such invalidation incident to a review on the merits. The amendment strikes subparagraph (i) from the section. Section 706 of title 5 is the section of the Administrative Procedure Act concerning the scope of judicial review and details the basis for invalidation of agency action. Included therein is item (2)(D) which provides that a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be "without observance of procedure required by law". Adequate authority is therefore provided by law to inquire into matters governed by the new section in the event of such subsequent judicial review. The exception in subsection (h) in lines 13 and 14 of page 12 referring to subsection (i) is also deleted as a conforming amendment as is the reference to subsection (i) in original subsection (j) which would then be re-lettered.

Page 12, line 24; Page 13, lines 11 and 20;
Page 14, lines 5, 9 and 14

These are conforming amendments to change subsection designations as the result of the deletion of subsection (i).

Page 12, lines 19 through 23

(Deletion of Provision Concerning Assessment of Attorneys Fees and Costs Against Individual Agency Members)

The provision is deleted because it was concluded that it is not desirable or even possible to assess costs against individual members for actions taken by a collegial body based upon the participation by those agency members in agency action.

Page 18, line 8

(Amendment to Information Permitted to be Withheld Conforming Amendment to that Added to 552b(c) (3) on page 3)

As introduced, the bill would have also amended the Freedom of Information Act provisions of § 552(b) (3) to limit the exception for information covered by statutes to only information covered by statutes which require that information of a particular type or criteria be withheld. This would not provide an exception for statutes which permit the agency to determine whether such information should be released or not. The amendment was made because the language is unduly restrictive.[1] (For example, the section concerning release of atomic energy information permits a continuous review of restricted data to permit declassification where information may be declassified "without undue risk to the common defense and security." 42 U.S.C. 2162)

Outline of Provisions of the Bill

Section 1 of the bill provides that the Act is to be cited as the "Government in the Sunshine Act".

Section 2 of the bill states that the bill is intended to provide the public with the fullest practicable information as to Governmental decisionmaking processes.

Section 3(a) of the bill adds a new Section 552b to title 5 and provides for open meetings by the agencies defined in the section.

Subsection (a) provides for definitions in addition to those applicable to the Administrative Procedure Act provisions of title 5. The term "agency" is to include Government authorities as defined in the Administrative Procedure Act provisions of section 551 and the Freedom of Information Act provisions of Section 552(e) with the further qualification that it is to be an agency headed by a "collegial" body of two or more members "a majority of whom are appointed to such position by the president with the advice and consent of the Senate".

The bill, as referred to the Committee on the Judiciary, would have defined "meeting" as the deliberations of the agency members required to take action concerning the joint conduct or disposition of agency business. The Judiciary Committee amendment is to strike

[1] Note the discussion concerning similar language and on identical amendment to the language of exception (3) of subsection (c) of new section 552b in the explanations of committee amendments and in the general statement of the committee in this report.

the previous definition of meeting and provide that the term "meeting" means an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency. The definition includes an exception that the term "meeting" will not include meetings required or permitted by subsection (d) of new Section 552b. Subsection (d) of the amended bill concerns the closing of agency meetings and the manner in which those meetings can be closed by votes of the agency.

A "member" means an individual who belongs to the collegial body heading an agency.

Subsection (b) of the bill as amended by the Judiciary Committee refers in subparagraph (b) (1) to "members", as described in Section (a) (2), as two or more members of an agency, but at least the number of agency members required to take action on behalf of the agency. This subparagraph provides that the members so described shall not jointly conduct or dispose of agency business without complying with subsections (b) through (g) of this section, which contain the requirements for meetings covered by the section. Subparagraph (b) (2) contains the language of original section (b) and states the basic requirement of the bill that every portion of every meeting of an agency is to be open to public observation unless falling within the exceptions of subsection (a).

Subsection (c) provides ten exceptions which authorize an agency to close "any portion of any agency meeting". These exceptions would permit closed meetings to prevent the disclosure of the following:

1. Matters authorized under executive order criteria to be kept secret in the interest of national defense or foreign policy.

2. Matters which relate solely to the internal personnel rules and practices of an agency.

3. Information required or permitted to be withheld from the public by any statute. The Judiciary Committee amendment to this provision was to insert the term "or permitted" to provide for an application to information covered by statutes requiring a degree of judgment or discretion in the release of information.

4. Privileged or confidential trade secrets and commercial or financial information obtained from a person.

5. Matters involving the criminal accusation of commission of a crime or formal censure of any person.

6. Information of a personal nature constituting an unwarranted personal invasion of privacy.

7. Investigatory records or information which if written would be contained in such records compiled for law enforcement purposes but with specific limitations where disclosure would:

(A) interfere with enforcement proceedings,

(B) deprive a person of a fair trial or an impartial adjudication,

(C) constitute an unwarranted invasion of personal privacy,

(D) disclose the identity of a confidential source and—as to records or information compiled in a criminal investigation by a criminal law enforcement authority, or as to records or information compiled by an agency in a lawful security intelligence in-

vestigation—confidential information furnished only by the confidential source,

(E) disclose investigative techniques and procedures,

(F) endanger the life or physical safety of law enforcement personnel.

8. Information by or for an agency responsible for the regulation or supervision of financial institutions concerning examination, operation or condition reports of those institutions.

9. Information where premature disclosure would—

(A) for agencies involved in the regulation of currencies, securities, commodities, or financial institutions which would either lead to significant financial speculation or to significantly endanger the stability of any financial institution, or

(B) be likely to significantly frustrate the implementation of a proposed agency action.

This exception would not be available after the content or nature of the proposed action has been disclosed to the public by the agency or unless the agency, as required by law, makes such disclosure prior to taking final agency action on the proposal. It is further provided in the amended bill that the exception will not be available after the agency publishes or serves a substantive rule pursuant to Section 553(d) of this title.

10. Concern matters relating to litigation, including those concerning the agency's issuance of a subpoena, participation in a civil action or proceeding, or action in a foreign court or international tribunal. The exception would also apply to matters concerning arbitration, formal agency adjudication or determinations on the record after opportunity for a hearing (formal rule making).

Subsection (d)(1) of the amended bill details the procedures to be followed in closing a portion or portions of a meeting. A separate recorded vote of agency members is required in each proposal to close a meeting. A "series of portions of meetings" for a period of 30 days involving the "same particular matters" can be closed by a single vote. Subsection (d)(2) provides that a person affected may make a request for closure based on the exceptions related to (5) accusation of a crime, (6) information of a personal nature or (7) investigatory records. Within one day of a vote to close, the written copy of the vote reflecting the vote of each member is to be made public and if a portion of a meeting is to be closed, there must be a full written explanation of the action of all persons who will attend and their affiliation. When a majority of an agency's meetings may be closed under exceptions relating to (4) trade secrets and financial information, (8) financial institution regulations, (9) premature disclosures concerning financial speculation, stability of financial institutions or frustration of agency action, or (10) matters relating to litigation, arbitration, formal agency adjudication or determinations on the record, the agency may provide by regulation for the closing of such portions of meetings. However, a majority of the members of the agency must still vote by recorded vote at the beginning of each meeting or portion thereof to close the exempt portion. The agency will also be required to provide the public with an announcement of the date, place and subject matter of the meeting and

"each portion thereof" at the earliest practicable time prior to the meeting.

Subparagraph (e) provides for the public announcement, at least one week before a meeting, of the date, place, subject matter and whether it is open or closed, but by recorded vote, a majority of the members may provide for an earlier meeting date, in which case the announcement must be made prior to the commencement of the meeting.

Subparagraph (f) (1) of the amended bill requires that there be a complete transcript or electronic recording of all meetings or portions of meetings closed to the public. The only exception is for meetings or portions closed relative to Exception 10 concerning litigation, arbitration, formal adjudication or formal rule making. A revised version of the transcript or recording, with the portions deleted which are covered by the exceptions of subsection (c), is to be made available to the public. The complete transcript or recording must be maintained for two years or for one year following disposition of the matter. Subparagraph (f) (2) provides that written minutes of open agency meetings shall be made public, and maintained for at least two years.

Subparagraph (g) requires promulgation of regulations to implement the requirements of the section. Notice and written comment are required. Any person can bring an action in the U.S. Court of Appeals for the District of Columbia to require promulgation or to challenge the regulations, and similarly any person can bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations not satisfying subsections (b) through (f) and to require new regulations that do so.

Subparagraph (h) of the amended bill confers jurisdiction on the district courts to enforce the requirements of the section and authorizes actions by any person which may be brought in the court of the United States for the district in which the agency meeting is held or in the District Court for the District of Columbia or where the agency has its headquarters. The Government has the burden to sustain its actions and the court will have access to any transcript or recording and may grant appropriate equitable relief. Nothing in the section may be taken as the sole basis for invalidating the agency action involved in the meeting which is the subject of the litigation.

Subparagraph (i) of the amended bill was previously subsection (j) and the designation was changed because the bill was amended to strike (i), as explained in the discussion of the committee amendments. The redesignated paragraph provides for attorneys fees and litigation costs for "any other party" who substantially prevails in an action. This can include assessment of costs against the United State. The Committee on the Judiciary struck language which would have permitted the assessment of costs against individual agency members. They may also be assessed against plaintiffs where the court finds that the primary motive was for frivolous or dilatory purposes.

Subparagraph (j) of the amended bill [relettered] provides for an annual report to Congress involving matters covered by the section.

Subparagraph (k) of the amended bill [relettered] relates to the Freedom of Information Act and in effect says that nothing in the section is to be interpreted as expending or limiting the rights of any

person under Section 552 except as specifically provided as to transcripts and recordings.

Subparagraph (l) of the amended bill [relettered] provides that the section is not to be construed as limiting information to Congress and does not authorize the closing of meetings required to be open by law.

Subparagraph (m) of the amended bill [relettered] preserves the rights of individuals to any record accessible under the Freedom of Information Act provisions of section 552(a).

Subparagraph (n) of the amended bill [relettered] provides that the section is to govern in the event of a meeting also subject to the Federal Advisory Committee Act.

Section 3(b) of the bill amends the chapter analysis of chapter 5 of title 5 by adding the catch line of new section 552b as follows:

"552b. Open meetings."

Section 4(a) of the bill adds a new subsection (d)(1) to section 557 of title 5, United States Code, concerning ex parte communications in relation to adjudication and formal rule making under the Administrative Procedure Act. Section 557 concerns decisions based on the record of hearings conducted in accordance with section 556. The new subsection (d) added by this bill would provide express limitations and procedures relating to ex parte communications relative to the merits of agency proceedings. The bar would apply to ex parte communications relative to the merits of such proceeding by interested persons outside the agency made to agency personnel involved or expected to be involved in the decisional process. Similarly, no such agency official could make an ex parte communication to an interested party outside the agency. The incorporation of the new subsection in Section 557 results in the provisions being made applicable to adjudications and to formal rule making. The language of the bill provides for communications or memoranda of oral communications to be made a part of the public record of the proceedings along with written responses and memoranda of oral responses. In the event there is such an ex parte communication, the agency, administrative law judge or presiding employee may require a party to show cause why his claim or interest in the proceeding should not be denied, dismissed or disregarded or otherwise be acted upon adversely.

Section 4(b) amends Section 551, the definitions section of the Administrative Procedure Act, to include an item (14) a definition of "ex parte communication". This term is defined as "an oral or written communication entered on the public record with respect to which reasonable prior notice to all parties is not given."

Section 4(c) amends Section 556(d) of title 5 which is the section concerning hearings, presiding employees, powers and duties, burden of proof, evidence and record as to basis of decision by the addition of a sentence referring to ex parte communications. The amendment is to add that "The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a person or party who has committed such violation or caused such violation to occur.

Section 5 of the bill provides for conforming amendments. Subsection (a) amends Section 410(b)(1) of title 39 (Postal Service) U.S.

Code to include in the subparagraph the words "Section 552(a) (records about individuals), Section 552(b) (open meetings),".

Subsection 5(b) of the amended bill amends Section 552(b)(3) of title 5, the subparagraph which relates to matters specifically exempted from disclosure by statute. As amended, subparagraph (3) would read: "Required *or permitted* to be withheld from the public by any statute establishing particular criteria or referring to particular types of information."

Section 6 of the bill provides that the bill is to take effect 180 days after the date of enactment, except that subsection (g) of Section 552b, added to title 5 by the bill, is to take effect upon enactment. Subsection (g) is the subsection which concerns the promulgation of implementing regulations.

Openness of Committee Meetings

The basic purpose of this bill is expressed in subsection (b) [amended as (b)(2)] of new section 552b where it is provided that meetings of agencies covered by the section are to be open to public observation unless the information being discussed falls within an exception in subsection (c). Our system of Government assumes that citizens have the right to know how their government operates and what the government is doing for them and in their name. Public participation and awareness will be promoted by increasing openness in Government and this should lead to improved decision-making and greater accountability on the part of the Government. At the same time, an understanding of Government operation and action will promote public confidence in the Government.

The subjects dealt with in this bill have been extensively considered both in the Senate and in the House. The provisions of the bill as referred to the Committee on the Judiciary has already been discussed at length in Part I of this report based upon the consideration of the bill before the House Committee on Government Operations (H. Rept. 94–880, 94th Cong. 2d Sess., Part I). A similar discussion as to provisions embodied in the Senate companion bill, S. 5, was the subject of the report of the Senate Committee on Government Operations (Senate Report 94–354, 94th Congress, 1st Session). It is therefore not necessary to discuss in detail the provisions of the bill which were approved without change by this Committee.

The consideration by the Committee on the Judiciary included two days of hearings on March 24 and 25, 1976. The committee further had the advantage of the previous hearings in the House and the Senate and the reports referred to above. The amendments recommended by the Committee are based on its consideration of the reports, testimony before the committee, and the material relating to the previous considerations made available to the Committee.

Agencies Subject to the Bill

Witnesses appearing at the hearing before this committee discussed the provisions of the bill which define the agencies which will be subject to its provisions. As has been indicated in the outline of provisions of the bill, the term "agency" is to include Government authorities as

defined in the Administrative Procedure Act provisions of section 551 and section 552(e) of title 5 with the further qualification that in order to be covered, an agency must be headed by a collegial body of two or more members, a majority of whom are appointed to their position by the President with the advice and consent of the Senate. The Senate report, in discussing the similar provisions of the bill before that body, included a list of agencies that would be covered by the bill. In view of the similarity of the provisions contained in the present bill and the bill S. 5, considered by the Senate, the list developed by the Senate is included at this point to indicate the potential coverage of the bill. However, the definition will govern the actual application of the bill rather than the list set out below. The list is as follows:

Board for International Broadcasting;
Civil Aeronautics Board;
Commodity Credit Corporation (Board of Directors);
Commodity Futures Trading Commission;
Consumer Product Safety Commission;
Equal Employment Opportunity Commission;
Export-Import Bank of the United States (Board of Directors);
Federal Communications Commission;
Federal Election Commission;
Federal Deposit Insurance Corporation (Board of Directors);
Federal Farm Credit Board within the Farm Credit Administration;
Federal Home Loan Bank Board;
Federal Maritime Commission;
Federal Power Commission;
Federal Reserve Board;
Federal Trade Commission;
Harry S. Truman Scholarship Foundation (Board of Trustees);
Indian Claims Commission;
Inter-American Foundation (Board of Directors);
Interstate Commerce Commission;
Legal Services Corporation (Board of Directors);
Mississippi River Commission;
National Commission on Libraries and Information Science;
National Council on Educational Research;
National Council on Quality in Education;
National Credit Union Board;
National Homeownership Foundation (Board of Directors);
National Labor Relations Board;
National Library of Medicine (Board of Regents);
National Mediation Board;
National Science Board of the National Science Foundation;
National Transportation Safety Board;
Nuclear Regulatory Commission;
Occupational Safety and Health Review Commission;
Overseas Private Investment Corporation (Board of Directors);
Parole Board;
Railroad Retirement Board;
Renegotiation Board;
Securities and Exchange Commission;

Tennessee Valley Authority (Board of Directors);
Uniformed Services University of the Health Sciences (Board of Regents);
U.S. Civil Service Commission;
U.S. Commission on Civil Rights;
U.S. Foreign Claims Settlement Commission;
U.S. International Trade Commission;
U.S. Postal Service (Board of Governors); and
U.S. Railway Association;

The committee considered the various suggestions concerning changes in the description of agencies covered by the bill and concluded that the general definition provides the best approach and therefore did not change the language as contained in the bill referred to the committee.

Meetings Subject to New Section 552b

A considerable portion of the testimony presented to the committee concerning the definition of "meeting" is included in the new section. The language of the bill as referred to the committee provided that a meeting would consist of "deliberations" which concern the joint conduct or disposition of agency business. It was pointed out that this language could make it difficult to identify a meeting in advance of that meeting, or to determine whether the "meeting" was one actually covered by the provisions contained in the bill. The subcommittee considering the bill recommended language which was intended to remedy this situation and provide the basis for adequate and meaningful notice required by the bill of the date and place of meetings, their subject matter, and whether they would be open or closed to the public. This language underwent further modification before the Full Committee and the language ultimately approved by the committee was to provide that "meeting" would be defined as "an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but does not include meetings required or permitted by subsection (d)". This definition makes it possible to determine and define the basic purpose of the meeting. As is indicated in the outline of provisions of the bill and also in the explanation of committee amendments, this definition must be read in the light of the amendment made to subsection (b) of new section 552b which prohibits the conduct or disposition of agency business other than as provided in subsections (b) through (g) of new section 552b. The definition of "meeting" contains the qualification that the term "meeting" for the purposes of the section will not include meetings required or permitted by subsection (d), a subsection which concerns the closing of meetings. As a result, it will be possible for agencies to make the necessary decisions concerning opening or closing meetings prior to the holding of covered meetings without being subject to the detailed procedures provided for in the balance of section 552b.

Clarification Concerning Exceptions

The committee considered the provisions of the exemption provided in subsection (c)(3) of section 552b concerning the disclosure of in-

formation required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information. This exemption was discussed at page 9 of the report of the Committee on Government Operations, which pointed out that, under the original language of this bill, a statute that permits withholding rather than actually requiring it would not come within the exception provided in the paragraph. While the committee agrees that the language concerning criteria or types of information should be retained, it was felt that limiting the exemption to information required to be withheld by statute would be too restrictive. Rather, the exemption should extend to those statutes which require or permit information to be withheld from the public where the statute establishes criteria or refers to particular types of information.[2]

The exemptions contained in subsection (c) of the new section are based on the exemptions presently contained in the Freedom of Information Act provisions of section 552 of Title 5. The latter exemptions relate to governmental records and in most instances, this same or similar language can be applied to information being presented at a meeting. However, it was brought to the attention of the committee that in connection with exemption No. 7, the exemption relating to investigatory records compiled for law enforcement purposes, it was important to qualify the provision to the extent that the exemption would be clearly applicable in addition to records to information which if written would be contained in such records. This is in the nature of a technical amendment which the committee feels is consistent with the basic purpose of the exemption in its original form. In the course of subcommittee consideration of this exemption, there was a discussion of whether there should be a change in the language to cover matters discussed at the agency meetings at an early stage of the investigation when it was not clear whether enforcement proceedings would actually be instituted. However, after a discussion, it was felt that the existing language was adequate to meet the situation.

Exemption 9 of subsection (c) of new section provides an exception relating to the withholding of information where premature disclosure would, in the case of an agency which regulates currency, securities, commodities or financial institutions, be likely to lead to significant financial speculation or significantly endanger the ability of a financial institution. The exemption would also apply to information where premature disclosure would likely significanty frustrate the implementation of proposed agency action. However, the latter exemption would not be available where the content or nature of the agency action has been disclosed to the public. It was objected that the time when this bar to the application of the exemption would go into effect was not clear by the use of the term "where". Accordingly, the committee recommended an amendment to substitute the word "after" so that the exemption would not be available after the content or nature of the proposed action had been disclosed by the agency. In a conforming amendment, the term "unless" was inserted so that the agency disclosure required by law would also be covered. A similar amendment was made to the same provision which in effect provided that the exemp-

[2] This would clarify the fact that statutes such as 50 U.S.C. 403(d)(3) concerning security information and 8 U.S.C. 222 concerning confidential records of the State Department concerning visas and related matters, are included.

tion would not be available after publication of agency notice of rule-making pursuant to section 553(d) of Title 5.

The committee also added a clarification to the exemption No. 10 which concerns agency participation in litigation or related matters. The qualification is to add the term "or proceeding" to the reference to agency participation in a civil action so that the exemption would clearly apply to information relating to the agency's participation in a civil action or proceeding.

Transcript Requirement

Subsection (f)(1) of the new section requires that a complete transcript or an electronic recording which is adequate to record the proceedings shall be made of each agency meeting or portion of a meeting closed to the public with the single exception of meetings closed to the public pursuant to paragraph 10 of subsection (c). The committee considered the difficulties incident to the review of the transcript of closed meetings required by the original provisions of the bill. The bill would have required that each deletion authorized by an exception in the section would be made by recorded vote of the agency taken subsequent to the meeting. It was pointed out this would require a considerable expenditure of the time of the senior officials of the agency and that this would be cumbersome and time-consuming. It was determined that the intent of the bill could be adequately carried out by deleting this provision and similarly deleting the provision requiring a written explanation of the reason and statutory basis for each deletion. These amendments would not change the requirements of the section making revised copies of the transcript or transcription of the electronic recordings available to any person upon payment of the cost of duplication or its transcription. Further, it is provided that if the agency determines it to be in the public interest, the material can be made available to the public without cost. The complete verbatim copy of the transcription or the complete electronic recording of each meeting closed to the public would be maintained by the agency for at least two years after the meeting or until one year after the conclusion of the agency proceeding with respect to which the meeting was held, whichever occurs later.

Court Jurisdiction Under Section 552b(h)

Subsection (h) provides jurisdiction in the district courts of the United States to enforce the requirements of sections (b) through (f) of the new section. Such actions may be brought by any person against the agency prior to or within sixty days after the meeting at which the alleged violation of the section occurred. The time limit would be varied in the event that a public announcement of the meeting had not been made in accordance with the requirements of the section. The original version of the bill would have provided jurisdiction in the courts to bring such actions against the agency or its members. The committee recommended the deletion of the provision for joinder of members for since the subsection authorizes an action against the agency, there would be no necessity to join individual members to gain court jurisdiction. Further, as is discussed below, the

committee also amended the bill to delete the provision authorizing the assessment of court costs against individual agency members. As was pointed out in the explanation of the committee amendments, these amendments remove the objection that individual agency members would be subjected to suit for official acts and possibly being asessed costs and attorneys fees in these circumstances. In line with these principles, the committee recommends the deletion of the provision in original subsection (j) which would have permitted the asessment of costs against individual members of an agency.

Objections were raised at the hearings on the bill concerning the breadth of the provisions concerning venue for actions authorized by the bill. The committee concluded that there should be no limitation upon the jurisdiction provided in the bill nor persons who could bring the actions contemplated by the bill. However, the bill concerns meetings and matters relating to meetings that have a definite relation to certain locations, and the practical aspects concerning government action and court consideration of these matters make it logical to provide venue in the district where the agency meeting is held, where the agency has its headquarters, or in the District Court for the District of Columbia.

Scope of Judicial Review

Subsection (i) of subsection 552b as contained in the bill referred to the committee would have provided that any federal court otherwise authorized by law to review agency action could on application of any person properly participating in the judicial review proceedings inquire into the violations of the requirements of the section and afford any relief deemed appropriate. The committee recommends deletion of this language. As was outlined in the explanation of the committee amendments, it was concluded that the provisions of section 706 of title 5 of the Administrative Procedure Act provides adequate authority to inquire into the matters apparently referred to in original subsection (i). Section 706 concerns judicial review and details the basis for invalidating agency action. Item 2(d) as contained in that section authorizes a court to set aside agency action which was taken "without observance of proceedings required by law". In consideration of matters covered by this section, the courts, in reviewing actions, would then therefore be prepared to proceed in accordance with their normal procedures under Section 706. The weight to be given violations of the provisions of section 552b would be considered as are other matters covered by this provision in the Administrative Procedure Act. The reviewing court would then be in a position to determine whether the violation was of material prejudice to the party involved.

Ex Parte Communications

The provisions added to Section 557 of title 5 of the United States Code by Section 4(a) of the bill are almost identical to the provisions contained in the bill H.R. 10197, presently pending before this committee. The bill H.R. 10197 was the subject of a hearing before this committee's Subcommittee on Administrative Law and Governmental Relations on December 4, 1975. At that hearing testimony was received from the American Bar Association in support of the provisions gov-

erning ex parte communications. At that hearing it was noted that the provisions of H.R. 10197 on this subject paralleled the provisions on the same subject contained in S. 5, the Senate companion measure to the present bill, H.R. 11656. At that time, the American Bar Association witness stated that the provisions in the Senate version were acceptable to his Association. The provisions in the bill H.R. 11656 have a different numbering system, but otherwise are substantially identical to the provisions referred to in the Senate bill, S. 5.

In order to ensure both fairness and soundness to adjudication and formal rule making, the applicable provisions of the Administrative Procedure Act require a hearing and decision on the record. Such hearings give all parties an opportunity to participate and to rebut others' presentations. Such proceedings cannot be fair or soundly decided, however, when persons outside the agency are allowed to communicate with the decision-maker in private and others are denied the opportunity to respond.

The present Administrative Procedure Act provisions of title 5 do place a degree of limitation on ex parte communications, but the coverage is not as complete as would be provided by this bill. For example, ex parte contacts with agency heads are not covered and neither are contacts relating to formal, on-the-record rulemaking hearings. The language of this bill would close the loopholes, and would prohibit all external ex parte communications between agency members (and decisional employees) and persons outside the agency regarding the merits of any formal proceeding. The proposal also provides that any prohibited communication received by an agency must be placed on the public record and that the agency may rule against the person who made the communication as a sanction for doing so. The bill therefore establishes a prohibition against ex parte communications in such formal, trial-type proceedings. It applies to all agencies governed by the Administrative Procedure Act. While this is presently implied by section 556(e) of the Administrative Procedure Act which states that "the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for decision", the Administrative Procedure Act provisions of title 5 contain no general statutory prohibition against ex parte contacts. To invalidate an agency proceeding because of ex parte contacts, a court must rely on constitutional standards, rather than specific provisions. *Sangamon Valley Television Corp.* v. *F.C.C.*, 269 F.2d 221 (1959). This bill would therefore provide for the first time a clear, statutory prohibition of ex parte contacts of general applicability.

The prohibition only applies to formal agency adjudication. Informal rulemaking proceedings and other agency actions that are not required to be on the record after an opportunity for a hearing will not be affected by the provision.

The ex parte rules established by this section do not repeal or modify the ex parte rules agencies have already adopted by regulation, except to the extent the regulations are inconsistent with this section. If an agency already has more stringent restrictions against ex parte contacts, this section will supplement those provisions. It is expected that each agency will issue new regulations applying the general provisions of this section in a way best designed to meet its special needs and circumstances.

The bill forbids ex parte communications between interested persons outside the agency and agency decisionmakers. The provision exempts only those ex parte communications authorized by law to be disposed of in such a manner. This exemption includes, for example, requests by one party to a proceeding for subpenas, adjournments, and continuances.

Contacts are forbidden between an interested person outside the agency and any agency member, administrative law judge, or other employee involved in the decisionmaking process. The word "employee" includes both those working for the agency full time and individuals working on a part-time basis, such as consultants.

The wording "interested persons" covers any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have. The term includes, but is not limited to, parties, competitors, public officials, and nonprofit or public interest organizations and associations with a special interest in the matter regulated. As used in this section, "person" has the same meaning as elsewhere in the Administrative Procedure Act.

The rule applies to interested persons who "make or knowingly cause to be made" an ex parte communication. The latter phrase contemplates indirect contacts which the interested person approves or arranges. For example, an interested person may ask another person outside the agency to make an ex parte communication. The section would apply to the individual who requested that the communication be made. However, if the second person contacts the agency about the first individual's interest in the case without that person's knowledge, approval, or encouragement, the first person would not be guilty of knowingly causing an ex parte contact.

Contacts are prohibited with any agency members, administrative law judge, or other employee who is or may reasonably be expected to be involved in the agency's deliberations. The words "may reasonably be expected" make it clear that absolute certainty is not required when predicting whether an agency employee will be involved in the decisional process. In some cases it will be clear that an employee does not come within the ambit of the provision. For example, an agency attorney litigating the case for the agency will not be involved in the decisionmaking process of the agency and would not be subject to the ex parte provision. Under other circumstances, the official's status may not be so clear. In such case, the fact that an interested person chooses to communicate with a particular employee in an ex parte manner is itself some evidence that the official may reasonably be expected to be involved in the decisional process. To assist the parties and the public in determining which agency officials may be involved in the decisional process, an agency may wish to publish, along with notice of the proceeding, a list of officials expected to be involved in the decisional process. The exparte rules would still apply to an agency official involved in the decisional process even if he were not on such a list.

Communications solely between agency employees are excluded from the section's prohibition. Of course, ex parte contacts by staff acting as agents for interested persons outside the agency are clearly within the scope of the prohibitions.

The subsection prohibits an ex parte communication only when it is "relevant to the merits of the proceeding." This phrase is intended to be construed broadly and to include more than the phrase "fact in issue" currently used in the Administrative Procedure Act. The phrase excludes procedural inquiries, such as requests for status reports, which will not have any effect on the way the case is decided. It excludes general background discussions about an entire industry which do not directly relate to specific agency adjudication involving a member of that industry, or to formal rulemaking involving the industry as a whole. It is not the intent of this provision to cut an agency off from access to general information about an industry that an agency needs to exercise its regulatory responsibilities. So long as the communication containing such data does not directly discuss the merits of a pending adjudication it is not prohibited by this section.

However, a request for a status report or a background discussion about an industry may in effect amount to an indirect or subtle effort to influence the substantive outcome of the proceedings. The judgment will have to be made whether a particular communication could affect the agency's decision on the merits. In doubtful cases the agency official should treat the communication as ex parte so as to protect the integrity of the decisionmaking process.

The bill also prohibits agency officials who are or who may be involved in the decisional process from engaging in an ex parte contact with an interested person. It embodies the same standards as are provided in paragraph (A) of new subsection (d) (1) of section 557 concerning persons outside the agency.

If an ex parte communication is made or received by an agency official, he must place on the proceeding's public record: (1) any illegal written communication, (2) a memorandum stating the substance of any illegal oral communication, and (3) any oral or written statements made in response to the original ex parte communication. The "public record" of the proceeding means the public docket or equivalent file containing all the material relevant to the case readily available to the parties and the public generally. Material may be part of the public record even though it has not been admitted into evidence.

The purpose of this provision is to notify the opposing party and the public, as well as all decisionmakers, of the improper contact and give all interested persons a chance to reply to anything contained in the illegal communication. In this way the secret nature of the contact is effectively eliminated. Agency officials who make an ex parte contact are under the same obligation to record it publicly as when an agency official receives such a communication. In some cases, merely placing the ex parte communication on the public reord will not, in fact, provide sufficient notice to all the parties. In the Senate report (Sen. Rpt. 94–354) on S. 5 it was suggested that in such cases each agency should consider requiring by regulation that in certain cases actual notice of the ex parte communication be provided all parties.

An officer presiding over the agency hearings in the proceedings may require a party who makes a prohibited ex parte communication to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise aversely affected because of the violation. This provision parallels the amendment provided in section 4(c) of the bill to section 556(d), which authorizes an agency to consider a violation of this section as grounds for rul-

ing against a party on the merits. The new language insures that the record of the proceeding contains adequate information about the violation. The presiding officer need not require a party committing an ex parte contact to show cause in every instance why the agency should not rule against him. The matter rests within his discretion.

The presiding officer should require such a showing only if consistent with the interests of justice and the policy of the underlying statutes. Thus a showing should be required where, among other factors, there will be shown to have been made knowingly, but not where the violation was clearly inadvertent.

The bill provides that the prohibitions against ex parte communications apply as soon as a proceeding is noticed for a hearing. However, if a person initiating a communciation before that time is aware that notice of the hearings will be issued, the prohibitions would apply from the time the person gained such awareness. An agency may require that the provisions of this section apply at any point in the proceedings prior to issuance of the notice of hearings.

Subsection (c) of section 4 of the bill adds a definition of "ex parte communication" to the definitions contained in the Administrative Procedure Act in section 551 of title 5. The term means an "oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." A communication is not ex parte if either, (1) the person making it placed it on the public record at the same time it was made, or (2) all parties to the proceeding had reasonable advance notice. If a communication falls into either one of these two categories, it is not ex parte. Where advance notice is given, it should be adequate to permit other parties to prepare a possible response and to be present when the communication is made. "Public record" means the docket or other public file containing all the material relevant to the proceedings. It includes, but is not limited to, the transcript of the proceedings, material that has been accepted as evidence in the proceeding, and the public file of related matters not accepted as evidence in the proceeding. An individual who writes a letter concerning the merits of the proceeding to a commissioner, and who places a copy of the letter at the same time in the transcript of the proceedings, would not have made an ex parte communication. However, a party who wrote the same letter and sent it only to a commissioner, would have committed a violation of the section even if the commissioner subsequently placed the letter in the public record.

Subsection (c) of section 4 of the bill amends section 556(d) of title 5, so as to authorize an agency to render a decision adverse to a party violating the prohibition against ex parte communications. It is intended that this provisioin apply to both formal parties, and to intervenors whose interests are equivalent to those of a party. This possible sanction supplements an agency's authority to censure or dismiss an official who engages in a nillegal ex parte communication, or to prohibit an attorney who violates the section from practicing before the agency. Such an adverse decision must be "consistent with the interests of justice and the policy of the underlying statutes." The Senate Report noted that one example would be an instance in which the interests of justice might dictate that a claimant for an old age benefit not lose his claim even if he violates the ex parte rules. On the other hand, where two parties have applied for a license and the applications are

of relatively equal merit, an agency may rule against a party who approached an agency head in an ex parte manner in an effort to win approval of his license.

The subsection specifies that an agency may rule against a party for making an ex parte communication only where the party made the illegal contact knowingly. An inadvertent ex parte contact must still be remedied by placing it on the public record. If the agency believes that such an unintentional ex parte contact has irrevocably tainted the proceeding, it may require the parties to make a new record. However, an agency should not definitively rule against a party simply because of an inadvertent violation.

Committee Vote

On April 6, 1976, the Full Committee on the Judiciary approved the bill H.R. 11656 by voice vote.

Conclsion

The Committee has concluded that the facts developed in the hearings on the bill and as outlined in this report demonstrate the need for legislative action with reference to meetings of the agencies covered by the provisions of the bill. It is recommended that the amended bill be considered favorably.

Cost

(Rule XII(7) (a) (1) of the House Rules)

The bill does not provide for any specific new government programs. As has been outlined in the report, the bill concerns amendments to the law concerning administrative procedures and adds new language concerning ex parte communications in connection with adjudication and formal rule making. Other than outlined below and in the Budget Office estimate it is not contemplated that those procedural changes will add significant cost to government activity.

The ex parte provisions of the legislation should result in no additional costs.

Most of the costs incurred in connection with the open meeting provisions will be for the clerical and administrative work they require, and it is estimated that such costs will be minimal.

Under the bill, the agency meetings open to the public will not require transcripts or electronic recordings. In most instances, minutes are already taken at such meetings, so the only additional expense will be that of duplicating one or more sets of the minutes to be made available to the public. (As provided in the bill, a member of the public desiring his own set of the minutes will bear the expense of copying, unless the agency deems it is in the public interest to supply them without cost.) The only other cost of an open meeting under this legislation is that of the public announcement.

An agency closing a portion of a meeting will have to make a transcript or electronic recording thereof. There will be approximately 50 covered agencies and the cost should therefore be directly proportional to the number of closed meetings. This cost could be further reduced if an electronic recording device, rather than stenographic notation,

is used. The cost of electronic recording equipment is estimated at a few thousand dollars per covered agency. The cost of transcription will be borne in large measure by members of the public requesting copies of transcripts.

Statement Under Clause 2(l)(3) and Clause 2(l)(4) of Rule XI of the Rules of the House of Representatives

A. Oversight Statement

This report embodies the findings and recommendations of the Subcommittee on Administrative Law and Governmental Relations pursuant to its oversight responsibility over administrative procedures of the Federal Government and its jurisdiction over the Administrative Procedure Act as codified in title 5, United States Code, pursuant to the procedures relating to oversight under Rule VI(b) of the Rules of the Committee on the Judiciary, and the committee has determined that legislation should be enacted as set forth in the amended bill.

B. Budget Statement

As has been indicated in the committee statement as to cost made pursuant to Rule XIII(7)(a)(1) the bill concerns administrative procedure and requirements concerning meetings of the agencies covered by the bill. Other than as required by the items of expense referred to in the attached estimate of the Congressional Budget Office, the bill should not involve new budget authority or require appreciable new or increased tax expenditures as contemplated by Clause 2(l)(3)(B) of Rule XI.

C. Estimate of the Congressional Budget Office

The estimate or comparison was received from the Director of the Congressional Budget Office, as referred to in subdivision (C) of Clause 2(l)(3) of House Rule XI, by the Commission on Government Operations and is set forth below. Unless otherwise stated, all figures represent cumulative totals for the approximately 50 agencies covered by the open meeting provisions of the bill:

Cost Estimate

Any projections of the costs of the "Sunshine Act" has to be tentative since the number of recording devices it will be necessary to buy and the amount of clerical time involved is difficult to estimate. With this limitation, the costs of making the proceedings of closed meetings available to the public could be $30,000 for new recording equipment and $130,000 annually for additional clerical help. Assuming a starting date of July 1, 1977, the budget impact would be:

Transition quarter	[1] 62,500
Fiscal year 1977	130,000
Fiscal year 1978	[2] 138,000
Fiscal year 1979	145,000
Fiscal year 1980	152,000
Fiscal year 1981	160,000

[1] $30,000 for recording devices, 25 percent of $130,000 in personnel costs.
[2] Salaries are tied to the changes in the CPI at a 5-percent real growth rate in GNP.

Basis of Estimate

The cost of a conference recording device should be about $400. This analysis has assumed that half of the fifty or so agencies in question will purchase one new recording machine, and that the other half will require two.

As for hiring additional clerical help, the assumption here is that one-quarter of the fifty agencies will do so at an average salary of $10,000 annually. If Congressional expectations that there will be few closed meetings are realized, this estimate on personnel could be on the high side of the spectrum.

Estimate Comparison

Senate Report 94–354 estimates that the cost per agency will be a few thousand dollars. The CBO cost projections are also in that range.

D. OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

No findings or recommendations of the Committee on Government Operations were received as referred to in subdivision (D) of clause 2(l)(3) of House Rule XI, however, the committee did have the advantage of the material contained in that Committee's legislative report, H. Rept. No. 94880, Part I, on this bill.

Inflationary Impact

In compliance with clause (l)(4) of House Rule XI it is stated that enactment of this legislation will have no inflationary impact on prices and costs in the operation of the national economy. The bill provides for the procedural matters referred to above. It does not provide for any new programs.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

* * * * * * *

CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

Sec.
500. Administrative practice; general provisions.
501. Advertising practice; restrictions.
502. Administrative practice; Reserves and National Guardsmen.
503. Witness fees and allowances.

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

SUBCHAPTER III—ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

§ 551. Definitions

For the purpose of this subchapter—

(1) * * *

* * * * * * *

(12) "agency proceedings" means an agency process as defined by paragraphs (5), (7), and (9) of this section; [and]

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.] *; and*

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.

* * * * * * *

§ 552. Public information; agency rules, opinions, orders records, and proceedings

(a) * * *

* * * * * * *

(b) This section does not apply to matters that are—

(1) * * *

* * * * * * *

[(3) specifically exempted from disclosure by statute:]

(3) required or permitted to be withheld from the public by any statute establishing particular criteria or referring to particular types of information;

* * * * * * *

§ 552b. Open Meetings

(a) For purposes of this section—

(1) the term "agency" means the Federal Election Commission and any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and includes any subdivision thereof authorized to act on behalf of the agency;

(2) the term "meeting" means an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but does not include meetings required or permitted by subsection (d); and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) (1) Members as described in subsection (a) (2) shall not jointly conduct or dispose of agency business without complying with subsections (b) through (g).

(2) Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, subsection (b) shall not apply to any portion of an agency meeting and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

(1) disclose matters (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose information required or permitted to be withheld from the public by any statute establishing particular criteria or referring to particular types of information;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an

agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would—

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that this subparagraph shall not apply in any instance after the content or nature of the proposed agency action has been disclosed to the public by the agency, unless the agency is required by law to make such disclosure prior to taking final agency action on such proposal, or after the agency publishes or serves a substantive rule pursuant to section 553(d) of this title; or

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d) (1) Action under subsection (c) to close a portion or portions of an agency meeting shall be taken only when a majority of the entire membership of the agency votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c). A single vote may be taken with respect to a series of portions of meetings which are proposed to be closed to the public, or with respect to any information concerning such series, so long as each portion of a meeting in such series involves the same particular matters, and is scheduled to be held no more than thirty days after the initial portion of a meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day

of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: Provided, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the date, place, and subject matter of the meeting and each portion thereof at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

(e) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the date, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the date, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time and in no case later than the commencement of the meeting or portion in question. The time, place, or subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this paragraph only if (1) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (2) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

(f)(1) A complete transcript or electronic recording adequate to record fully the proceedings shall be made of each meeting, or portion of a meeting, closed to the public, except for a meeting, or portion of a meeting, closed to the public pursuant to paragraph (10) of subsection (c). The agency shall make promptly available to the public, in a location easily accessible to the public, the compete transcript or electronic recording of the discussion at such meeting of any item on the agenda, or of the testimony of any witness received at such meeting, except for such portion or portions of such discussion or testimony as the agency determines to contain information specified in paragraphs (1) through (10) of subsection (c). Copies of such

transcript, or a transcription of such electronic recording disclosing the identity of each speaker, shall be furnished to any person at no greater than the actual cost of duplication or transcription or, if in the public interest, at no cost. The agency shall maintain a complete verbatim copy of the transcript, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting, or a portion thereof, was held, whichever occurs later.

(2) Written minutes shall be made of any agency meeting, or portion thereof, which is open to the public. The agency shall make such minutes promptly available to the public in a location easily accessible to the public, and shall maintain such minutes for a period of at least two years after such meeting. Copies of such minutes shall be furnished to any person at no greater than the actual cost of duplication thereof or, if in the public interest, at no cost.

(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any persons, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time therefor provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section, and to require the promulgation of regulations that are in accord with such subsections.

(h) The district courts of the United States have jurisdiction to enforce the requirements of subsections (b) through (f) of this section. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held, or in the District Court for the District of Columbia, or where the agency in question has its headquarters. In such actions a defendant shall serve his answer within twenty days after the service of the complaint, but such time may be extended by the court for up to twenty additional days upon a showing of good cause therefor. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of a transcript or electronic recording of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the party,

may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section, or ordering the agency to make available to the public such portion of the transcript or electronic recording of a meeting as is not authorized to be withheld under subsection (c) of this section. Nothing in this section confers jurisdiction on any district court acting solely under this subsection to set aside, enjoin or invalidate any agency action taken or discussed at an agency meeting out of which the violation of this section arose.

(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assesed by the court against the United States.

(j) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

(k) Except as specifically provided in this section, nothing herein expands or limits the present rights of any person under section 552 of this title, except that the provisions of this Act shall govern in the case of any request made pursuant to such action to copy or inspect the transripts or electronic recordings described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts and electronic recordings described in subsection (f) of this section.

(l) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof otherwise required by law to be open.

(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts or electronic recordings required by this Act, which is otherwise accessible to such individual under section 552a of this title.

(n) In the event that any meeting is subject to the provisions of the Federal Advisory Committee Act as well as the provisions of this section, the provisions of this section shall govern.

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§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) * * *

* * * * * * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide

for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. *The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a person or party who has committed such violation or caused such violation to occur.* A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

* * * * * * *

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) * * *

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relative to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or cause to be made to any interested person outside the agency an ex parte communication relative to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) in the event of a communication prohibited by this subsection and made or caused to be made by a party or interested person, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require

the person or party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This section does not constitute authority to withhold information from Congress.

* * * * * * *

SECTION 410 OF TITLE 39, UNITED STATES CODE

§ 410. Application of other laws

(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

(b) The following provisions shall apply to the Postal Service:

(1) Section 552 (public information), *section 552a (records about individuals)*, *section 552b (open meetings)*, section 3110 (restrictions on employment of relatives), section 3333 and chapters 71 (employee policies) and 73 (suitability, security, and conduct of employees), and section 5532 (dual pay) of title 5, except that no regulation issued under such chapters or sections shall apply to the Postal Service unless expressly made applicable;

* * * * * * *

OVERSEAS PRIVATE INVESTMENT CORPORATION,
Washington, D.C., April 5, 1976.

HON. PETER W. RODINO, JR.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The Overseas Private Investment Corporation (OPIC) offers the following additional comments regarding H.R. 11656, the Government in the Sunshine Act (the "bill").

Comments by OPIC regarding the bill were previously submitted to the Subcommittee on Government Information and Individual Rights, Committee on Government Operations, by letter dated November 26, 1975, a copy of which is included in the report of the hearings before the Subcommittee. As the bill was referred from the Government Operations Committee, there were several provisions that were of serious concern to OPIC. We believe some of these provisions have been improved. Nevertheless, the following matters remain of serious concern to us.

COMMENTS OF SPECIFIC PROVISIONS

1. *Closing Mettings by Regulation.*—Section 3(d)(4) of the bill authorizes agencies to adopt regulations for the closing of portions of meetings whenever a majority of the meetings of such agency may properly be closed to the public pursuant to paragraphs (4), (8), (9)(A) or (10) of Subsection (c). This section does not authorize the adoption of such regulations whenever the majority of such meetings would properly be closed under paragraph (1); i.e., whenever such meetings would involve the discussion of information kept secret for reasons of national security. OPIC believes that this is an error that should be corrected.

Of the forty-seven agencies that the Senate Report identifies as being subject to the provisions of section 201(section 3 of the companion bill), only a small minority would have the need to use with any frequency information classified for reasons of national security OPIC is one of the few such agencies which need to use classified information to the extent that a substantial portion of its meetings would be closed because the meetings would involve discussions of classified information.

OPIC's functions are an integral part of the foreign relations of the United States. Information properly kept secret for reasons of foreign relations is discussed in most meetings of OPIC's Board of Directors in connection with the Board's determination of policy issues with respect to OPIC's operations, the review of policy issues in projects to be considered by the Board of Directors and the review of events regarding actual or potential claims under OPIC insurance contracts or events that would affect an OPIC-financed project.

Since the majority of the meetings of OPIC's Board of Directors, or portions thereof, could properly be closed to the public for reasons of national security, OPIC's inability to adopt regulations pertaining to the closing of meetings under such circumstances would constitute an additional and unwarranted administrative burden. This is especially true because the need to discuss classified information cannot regularly be predicted in advance of a scheduled meeting, may necessitate special meetings on short notice, and, in the case of meetings of OPIC's Board of Directors, may not arise until after the meeting commences.

2. *Requirement of a Verbatim Transcript of Closed Meetings.*—OPIC still objects to the inclusion in the bill of the provisions requiring that a mandatory transcript be made of each meeting, or portion thereof, closed to the public. As long as the transcript requirement remains, the provisions of the bill permitting the closure of meetings do not provide adequate protection from public disclosure of information discussed at meetings. The exemptions merely provide standards to be used in determining whether any information to be discussed at a meeting is of such a nature as to justify withholding it from the public. Since the bill provides for *de novo* review by the courts, a judge could overrule an agency's determination (for instance, in the case of privileged business information) that such information is privileged even though it was furnished to the agency and discussed at a meeting on the assumption that information and the discussion

would not become available to others. This risk will clearly be a deterrent to full and free discussion of sensitive issues which the bill purports to protect.

Furthermore, in view of the fact that classified information, confidential business information and matters with respect to potential adjudication of claims would be discussed regularly at meetings of OPIC's Board of Directors, the costs of preparing a verbatim transcript of such meetings, or of editing any transcript or summary in order to delete discussions of sensitive materials, would be very high and burdensome. We have already provided information with respect to the administrative burden involved to the various Committees that have considered this matter.

As a workable alternative to the requirement for a verbatim transcript of all closed meetings or portions thereof, OPIC recommends an approach similar to that adopted by the Senate and the House in applying the open meeting concept to their own proceedings. Thus, for instance, a majority of a Committee may vote both to close one of its meetings to the public and either to have such closed meeting transcribed or not. To impose a more stringent requirement on the Executive Branch would result in a double standard of openness, one of flexibility for the Congress and the other of rigidity for executive agencies.

GENERAL COMMENTS

For the reasons set forth in pages 1 to 3 of our letter of November 26, 1975, to the Subcommittee on Government Information and Individual Rights, Committee on Government Operations, we reiterate our view that it is, in any event, inappropriate to include OPIC within the scope of the bill. OPIC is not a regulatory agency. It operates more like a private financial institution than a government agency. OPIC's Board of Directors must be free to examine and candidly discuss, as would the Board of Directors of a private financial institution, all aspects of underwriting policy, applications pending before the Board for insurance or financing, and matters concerning insurance claims. Involved in these discussions are candid assessments of individuals, companies and events and the liberal use of privileged business information and governmental information kept secret for reasons of foreign relations. Such discussions must be carried out in a confidential manner that is not adequately protected by the bill.

The requirement that a verbatim transcript must be maintained within respect to any closed meeting, and that any person may sue to obtain access to any such transcript, would result in the ever-present concern of the private sector entities who deal with OPIC as well as of participants in meetings of OPIC's Board, that a judge could later hold that matters either given or spoken with the understanding that they be treated in confidence were not entitled to such protection. Such a concern, particularly among OPIC's private Directors, and among the private companies with which OPIC deals, will inevitably result in less than a full and free exchange of ideas, and could materially undermine the Congressional mandate that OPIC achieve greater private participation in its programs.

Sincerely yours,

GERALD D. MORGAN, JR.,
Vice President and General Counsel.

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., April 5, 1976.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: The Civil Service Commission is herewith submitting a voluntary report on H.R. 11656, a bill "To provide that meetings of Government agencies shall be open to the public, and for other purposes," cited as the "Government in the Sunshine Act."

The Commission submitted a similar report to the Subcommittee on Administrative Law and Government Relations but we understood that the Subcommittee was not able to reach the Commission's proposed amendment to the bill. We accordingly again urge amendment to H.R. 11656 based on the considerations stated herein.

Unlike certain other central agencies designed to service the Federal Government, such as the General Services Administration, the Commission is a three-member body. But, unlike most such multi-headed Commissions, the Civil Service Commission does not regulate any segment of the economy affecting the general public. The Commission's primary mission is to provide leadership and regulatory direction to the central personnel programs of the executive branch.

The drafters and sponsors of H.R. 11656 recognized that agency internal personnel matters are not of direct interest to the general public and have no direct impact on the public sector. Therefore, they provided an exemption in the bill from the public meeting requirements. The Commission strongly supports this exemption, but urges that it be modified to apply not just to individual agency personnel programs but also to inter-agency personnel programs administered by the Civil Service Commission. Just as the separate parts are now exempt—so, too, should be the whole.

The exemption should be extended to Government-wide personnel rules and practices to meet the need of the Commission to continue to carry out its internal Governmental personnel management responsibilities as efficiently and effectively as possible. In addition, the Commission's meetings concerning Government-wide policies and programs in labor-management relations as well as agency labor-management relations should be included in this exemption. We do not believe that the decision-making process in regard to agency and Government-wide labor-management relations strategy and negotiation considerations should be exposed to public view and particularly the view of those with whom we will be negotiating. The Commission and other agencies could hardly adopt flexible negotiating positions when the fall-back positions and strategies have been discussed and decide in public sessions attended by both parties to the negotiations.

Accordingly, we respectfully urge that the exemption to open meetings in proposed section 552b(c) (2) of title 5, United States Code, in H.R. 11656 be amended to read as follows: "(2) relate to the internal personnel rules and practices or labor-management relations policy of an agency or to Government-wide personnel rules and practices or to Government-wide labor-management relations policy;"

By direction of the Commission:

Sincerely yours,

ROBERT E. HAMPTON,
Chairman.

ADDITIONAL VIEWS OF HON. CARLOS J. MOORHEAD AND HON. THOMAS N. KINDNESS (CONCURRED IN BY HON. EDWARD HUTCHINSON, HON. HENRY J. HYDE, HON. HAMILTON FISH, JR., AND HON. WILLIAM S. COHEN)

INTRODUCTION

We fully support the principle that governmental decisionmaking should be as open to public scrutiny as is Constitutionally and practically possible. An informed public is an essential element in assuring the effectiveness and viability of the American system of government.

We have no quarrel with the stated purpose of the "Government in the Sunshine Act". Furthermore, we are greatly encouraged by the changes made in H.R. 11656 by the Subcommittee on Administrative Law and Governmental Relations, as agreed to by the full Committee on the Judiciary. As amended, this legislation is less ambiguous less likely to produce extensive litigation, and less likely to impose unrealistic and unfair burdens on the ability of government agencies to perform the functions for which they were created. There still remains, however, considerable room for improvement.

THE DEFINITION OF AGENCY

The definition of "agency" should be made more specific. In defining "agency" in subsection (a)(1) of section 3, the bill relies, first, upon the definition of "agency" as it is found in the amended Freedom of Information Act, 5 U.S.C. 552(e). The FOIA definition, in turn, is based largely on the definition of 'agency' as it is contained in the Administrative Procedure Act, 5 U.S.C. 551(a). Then subsection (a)(1) makes the additional qualification that it extends only to those Federal agencies headed by "collegial bodies composed of two or more members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate." Panels, Regional Boards, and other subdivisions authorized to act on behalf of an agency are also intended to be covered by this definition.

Administration witnesses appearing before our Committee argued that the definition of "agency", as it now stands, is unclear in its scope and can only result in extensive litigation. In testimony before our Committee, Deputy Attorney General Tyler noted that recent cases reflect a confusion about the scope of the definition of "agency", both in the APA and the FOIA. See: *Renegotiation Board* v. *Grumman Aircraft*, 421 U.S. 168, 187–8 (1975); *Soucie* v. *David*, 448 F. 2d 1067, 1075 (D.C. Cir., 1971); *Washington Research Project, Inc.*, v. *H.E.W.*, 504 F.2d 238, 245–8 (D.C. Cir., 1974). These decisions suggest that administrative entities may be "agencies" for some but not

all purposes, depending on the particular function they're performing in a particular instance.

A listing of those agencies which Congress specifically intends to cover by this legislation seems to us to be an exact and logical manner in which to proceed. The inclusion of such a list, as an alternative to a generalized definition, would avoid any confusion as to which agencies are covered and would minimize litigation. Such an approach was taken in the Government Corporation Act of 1945, 31 U.S.C. 841 et. seq., where there was a similar problem of entities not easily defined in one statutory phrase.

THE DEFINITION OF MEETING

The definition of 'meeting' in subsection (a)(2) is another problem area. We are particularly concerned about the language inserted by the full Judiciary Committee, which is troublesome for two reasons. First, the new definition does not contain the "purpose" test agreed to by the Administrative Law Subcomittee. So, instead of reading "a gathering to jointly conduct or dispose of agency business . . .", the definition now reads: "an assembly or simultaneous communication concerning the joint conduct or disposition of agency business . . ." The new language leaves open the possibility that this Act could apply to casual or social encounters, where agency business might be discussed. It also could apply to a situation where one agency member gives a speech concerning agency business with other agency members present in the audience.

Second, this new definition also extends to "simultaneous communication(s)" of agency members. This is an obvious attempt to bring conference telephone calls within the ambit of the definition. That intention had previously been rejected in Subcommittee. How, one may ask, can a telephone conversation be viewed as a public meeting? 'Meeting', within the terms of the Sunshine legislation should be limited to an actual "gathering" of agency members in a single, physical location for the sole purpose of conducting official agency business.

EXEMPTION PROCEDURES

Subsection (d)(1) requires a majority vote of the entire membership of the agency for any meeting to be closed pursuant to the exemptions listed in subsection (c)(1)–(10). In many cases, regulatory agencies are permitted by statute to adopt procedures by which sub-groups or panels can be delegated the responsibility to take action on behalf of the entire agency. See, for example, the Communications Act Amendments of 1952. 47 U.S.C. § 155(d). Why then, if a subdivision can act on behalf of an agency in substantive, policy matters, shouldn't it also be able to close meetings? The provision elevates procedure to a position of greater importance than the substantive, policy deliberations for which the meetings are to be held. As the bill is now written, a majority of the entire agency board or commission would have to convene to close the meetings of such panels or subdiviisons. We support the deletion of the phrase "a majority of the entire membership of" from subsection (d)(1) of the bill.

JUDICIAL REVIEW

We are also deeply concerned about granting "any person" the right to sue to enforce the provisions of the Sunshine Act. Subsection (h) permits any individual, irrespective of the usual standing requirements, to bring an action in a U.S. District Court to enjoin or remedy violations of any of the substantive provisions of the Act. There is serious question whether or not by doing away with normal Federal court standing requirements, that H.R. 11656 violates the "case and controversy" requirements of Article 3 of the Constitution. Furthermore, the encouragement of litigation on such a broad scale can only serve to seriously interfere with the efficient administration of government. Subsection (h) should be amended so as to require that a plaintiff makes some showing of specific harm to his interests.

Subsection (h) also contains a provision requiring that the defendant (the government) must serve his answer to a complaint within 20 days (an additional 20 days may be allowed by the court on a showing of "good cause"), instead of the 60 days normally allowed. This accelerated answer provision has its origins in the Senate bill (S. 5). However, the Senate version also required that, before instituting a suit, the plaintiff must first notify the agency and give it a reasonable time (up to ten days) to rectify the violation. No comparable notification requirement is present in the House bill. There can be no question but that a notice provision would alleviate the volume of litigation encouraged by this Act. If the accelerated answer provision is to remain in H.R. 11656, then the notification requirement present in the Senate bill should also be included in this legislation as a matter of fundamental fairness.

SUMMARY

Again, we support the purposes of H.R. 11656, but still retain serious reservations about the advisability and practicality of certain of its key provisions. We retain the hope that further improvements can be made, when this legislation is considered on the House Floor.

CARLOS J. MOORHEAD.
THOMAS N. KINDNESS.
HENRY J. HYDE.
EDWARD HUTCHINSON.
HAMILTON FISH.
WILLIAM S. COHEN.

SUPPLEMENTAL VIEWS OF HON. EDWARD HUTCHINSON AND HON. ROBERT McCLORY (CONCURRED IN BY HON. THOMAS N. KINDNESS, HON. HENRY J. HYDE, AND HON. JOHN M. ASHBROOK)

We are deeply concerned about the scope of the verbatim transcript requirement found in subsection (f)(1) of H.R. 11656. Implicit in this provision is the ill-founded belief that the public somehow has an inherent right to know everything about governmental deliberations, no matter what their content or the potential harm of public disclosure.

The American people certainly have legitimate interest in knowing how governmental decisions are made. However, this "right to know" has never been and cannot be viewed as an absolute. It must be modified, for example, by such competing interests as: (1) the national security; (2) Constitutional right of personal privacy; (3) the need for economic stability and security and (4) law enforcement effectiveness and efficiency. This legislation requires that all agencies which come under the scope of the Sunshine bill make a complete transcript or electronic recording of all of their proceedings. This requirement would extend even to those meetings, validly closed pursuant to the exemptions noted in subsection (c)(1–10). So, for example, a complete record must exist for all closed meetings of the Federal Reserve Board and Securities and Exchange Commission, no matter how sensitive the content or how damaging unwarranted disclosure could be.

First, we object to the imposition of an across-the-board transcript and electronic recording requirement. We object because of the very practical and real possibility that privileged subject matter could easily be leaked. Second, as written, this provision leaves the decision regarding disclosure of the complete transcript of a closed meeting solely up to the agencies in question. This discretion leaves room for arbitrary and tyrannical disregard of individual rights by a majority vote in a bureaucracy.

There are practical objections as well. Since the provision clearly leaves open the possibility of subsequent disclosure of a complete transcript of a closed meeting, the likelihood is that the free exchange of ideas between agency members about sensitive policy matters will be greatly hampered. This requirement can only be viewed as potentially impairing the decision-making processes of government.

Proponents argue that a complete transcript of closed meetings must be retained by the agency so that it will be available for an "in camera" review of a judge, should litigation of the appropriateness or contents of a closed meeting develop. Discovery procedures available in Federal courts have never depended upon the availability of verbatim transcripts or electronic recordings of agency meetings. Furthermore, this attitude is evidence of Congress once again dele-

gating to the courts the power to make a decision on a policy question that is properly within our prerogatives.

We strongly feel that Congress would be ill-advised to pass H.R. 11656 containing this damaging transcript requirement. The desperate attempt to appear "open" at all costs, can only result in the diminution of the rights and expectations of the citizens we seek to serve.

EDWARD HUTCHINSON.
ROBERT MCCLORY.
THOMAS N. KINDNESS.
HENRY J. HYDE.
JOHN A. ASHBROOK.

SUPPLEMENTAL VIEWS OF HON. EDWARD MEZVINSKY, HON. JOHN SEIBERLING

We think that this is an excellent bill, though we regret certain weakening amendments made by the Administrative Law and Governmental Relations Subcommittee and adopted by the full Judiciary Committee. We believe that one such change is of particular importance, and it is to this change that our supplemental views are specifically addressed.

The bill, as originally considered by the Committee on Government Operations and its Government Operations and Individual Rights Subcommittee, required that when a deletion of exempt material was made from a meeting transcript, the agency was to explain the reason and statutory authority for the deletion and provide a summary or paraphrase of the deleted material. The Government Information and Individual Rights Subcommittee, in a compromise move, dropped the requirement of a summary or paraphrase, leaving only the requirement that a statement of the reason and the statutory basis for the deletion be set forth.

Our Subcommittee on Administration Law and Governmental Relations further amended the bill by dropping even the requirement for a statement of the reason and statutory authority for the deletion, and the full Judiciary Committee concurred in this amendment. The effect of this change is to leave only a blank space where material is deleted, providing not even a hint of what has been removed, or by what authority.

This would leave a citizen interested in what had occurred at a meeting entirely in the dark about what has been deleted. To provide the reason and the applicable statute would impose no significant burden upon the administrative agency, while supplying—as is generally required with respect to agency decisions—the reason for the agency action. We note that a similar explanation is required under the Federal Advisory Committee Act. The absence of even this simple explanation is likely to generate unnecessary litigation from citizens who do not know the reason for the deletion, thus wasting the taxpayers' time and money in defending needless actions.

We believe that the people's right to know, as expressed in this legislation, includes the right to be given the reason why they are prevented from having information about agency action. We believe that the compromise version of this provision that was adopted by the Committee on Government Operations properly balanced the right to know against the need to keep certain matters secret and urge that the compromise language be reinstated.

EDWARD MEZVINSKY.
JOHN SEIBERLING.

SUPPLEMENTAL VIEWS OF HON. BOB KASTENMEIER

We think that this is an excellent bill, though we regret certain weakening amendments made by the Administrative Law and Governmental Relations Subcommittee and adopted by the full Judiciary Committee. We believe that one such change is of particular importance, and it is to this change that our supplemental views are specifically addressed.

The bill, as originally considered by the Committee on Government Operations and its Government Operations and Individual Rights Subcommittee, required that when a deletion of exempt material was made from a meeting transcript, the agency was to explain the reason and statutory authority for the deletion and provide a summary or paraphrase of the deleted material. The Government Information and Individual Rights Subcommittee, in a compromise move, dropped the requirement of a summary or paraphrase, leaving only the requirement that a statement of the reason and the statutory basis for the deletion be set forth.

Our Subcommittee on Administrative Law and Governmental Relations further amended the bill by dropping even the requirement for a statement of the reason and statutory authority for the deletion, and the full Judiciary Committee concurred in this amendment. The effect of this change is to leave only a blank space where material is deleted, providing not even a hint of what has been removed, or by what authority.

This would leave a citizen interested in what had occurred at a meeting entirely in the dark about what has been deleted. To provide the reason and the applicable statute would impose no significant burden upon the administrative agency, while supplying—as is generally required with respect to agency decisions—the reason for the agency action. We note that a similar explanation is required under the Federal Advisory Committee Act. The absence of even this simple explanation is likely to generate unnecessary litigation from citizens who do not know the reason for the deletion, thus wasting the taxpayers' time and money in defending needless actions.

We believe that the people's right to know, as expressed in this legislation, includes the right to be given the reason why they are prevented from having information about agency action. We believe that the compromise version of this provision that was adopted by the Committee on Government Operations properly balanced the right to know against the need to keep certain matters secret and urge that the compromise language be reinstated.

BOB KASTENMEIER.

SUPPLEMENTAL VIEWS OF HON. JACK BROOKS AND HON. ELIZABETH HOLTZMAN

We think that this is an excellent bill, though we regret certain weakening amendments made by the Administrative Law and Governmental Relations Subcommittee and adopted by the full Judiciary Committee. We believe that one such change is of particular importance, and it is to this change that our supplemental views are specifically addressed.

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JACK BROOKS.
ELIZABETH HOLTZMAN II.

SUPPLEMENTAL VIEWS OF HON. JOHN CONYERS

We think that this is an excellent bill, though we regret certain weakening amendments made by the Administrative Law and Governmental Relations Subcommittee and adopted by the full Judiciary Committee. We believe that one such change is of particular importance, and it is to this change that our supplemental views are specifically addressed.

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JOHN CONYERS.